Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the	)	
Interstate Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g)	)	
of the Communications Act of 1934,	)	
as Amended	)	

FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Powell issuing a statement.

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I. INTRODUCTION

1. In this Further Notice of Proposed Rulemaking (Further Notice), we seek further comment on several issues regarding the application of rate integration under section 254(g) of the Communications Act, as amended,[1] to the interstate, interexchange services offered by commercial mobile radio service (CMRS) providers. Pending further rulemaking, we keep in place the Order adopted by the Commission on October 2, 1997, in which the Commission stayed the application of the requirement that CMRS providers of interstate, interexchange services integrate rates across affiliates, as well as application of rate integration requirements with respect to wide-area rate plans offered by CMRS providers.[2]

II. BACKGROUND

2. CMRS providers serve customers using mobile phone units that may originate or receive calls at locations within range of a compatible cell transmitter site. CMRS customers generally pay a flat monthly fee and an airtime charge for service within a defined local calling area. Some of these plans may include a specified number of local airtime minutes as part of the flat monthly charge. If a customer makes a long-distance call from within its local calling area, the customer may also pay a long-distance charge. When roaming, the customer also will generally pay a roaming charge for originating a call, or receiving a call, outside its plan's service area. If making a call when roaming, a customer will generally pay a long-distance charge for terminating a call outside the local calling area in which the call was originated. Conversely, if a customer receives a call from outside the

[1] 47 U.S.C. § 254(g).

[2] Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Order*, CC Docket No. 96-61, 12 FCC Rcd 15,739 (1997) ("*Rate Integration Stay Order*").

local calling area of the roamed upon carrier, a customer may be assessed a toll charge for transmitting the call from the customer's home switch to the switch of the roamed upon carrier. Many CMRS providers offer wide-area calling plans that permit customers to make calls without roaming or long-distance charges over a calling area wider than the local calling area. These wide-area calling plans may be regional, or they may offer national coverage. Prior to the 1996 Act, the Commission had not applied any rate integration obligations to CMRS providers.

3. In the 1996 Act,[3] Congress enacted section 254(g), which, as relevant to this order, requires the Commission to adopt rules that "require that a provider of interstate, interexchange service shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[4] In March 1996, the Commission released a notice of proposed rulemaking seeking comment on, *inter alia,* proposed rules to implement the rate integration provision of section 254(g).[5]

4. On August 7, 1996, in the *Rate Integration Order*,[6] the Commission adopted a rate integration rule that reiterated the language of section 254(g). The Commission stated that this rule would incorporate its existing rate integration policy, and would apply to all interstate, interexchange services, as defined in the Act, and to all providers of these services.[7] It interpreted the term "provider of interstate, interexchange service," as used in section 254(g), "to include parent companies that, through affiliates, provide service in more than one state."[8] Although the Commission did not address application of the rate integration requirement to CMRS providers, it did determine, *inter alia,* that American Mobile Satellite Carriers Subsidiary Corp. ("AMSC") is required to integrate rates charged for its offshore services into the rate structure offered for its mainland services because its services appeared to fall within the definition of interstate, interexchange telecommunications services subject to section 254(g).[9]

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[4] 47 U.S.C. § 254(g).

[5] *See generally* Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Notice of Proposed Rulemaking*, CC Docket No. 96-61, 11 FCC Rcd 7141 (1996) (*"Rate Averaging and Rate Integration NPRM"*).

[6] Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Report and Order*, CC Docket No. 96-61, 11 FCC Rcd 9564 (1996) (*"Rate Integration Order"*); see 47 C.F.R. § 64.1801.

[7] *Id.* at 9586-99.

[8] *Id.* at 9598, para. 69.

[9] *Id.* at 9589, para. 54.

5. On July 30, 1997, the Commission denied several petitions for reconsideration of the *Rate Integration Order*.[10] The Commission clarified that the rules implementing section 254(g) require carriers to integrate their rates across affiliates, but do not require a carrier to integrate an interstate, interexchange CMRS service with other interstate, interexchange service offerings.[11] The Commission stated that its rate integration rules require CMRS providers to provide interstate, interexchange CMRS services on an integrated basis in all states in which they provide services.[12]

6. On October 2, 1997, the Commission stayed application of the requirement that CMRS providers of interstate, interexchange services integrate rates across affiliates pending further reconsideration.[13] The Commission also stayed, pending reconsideration, the application of rate integration requirements with respect to wide-area rate plans offered by CMRS providers.[14]

7. On December 31, 1998, we reaffirmed our earlier determination that the rate integration requirement of section 254(g) applies to interstate, interexchange services offered by CMRS providers, and therefore denied the petitions for reconsideration of that determination.[15] We clarified that CMRS traffic within a major trading area (MTA)(intra-MTA traffic) is not "interexchange" traffic and thus not subject to the rate integration requirement of section 254(g). We also denied petitions for forbearance from the application of rate integration to CMRS under section 10 of the Act.[16]

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[10] Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *First Memorandum Opinion and Order on Reconsideration*, CC Docket No. 96-61, 12 FCC Rcd 11,812 (1997) ("*Rate Integration Reconsideration Order*").

[11] *Id.* at 11,818-22.

[12] *Id.* at 11821, para. 18.

[13] *Rate Integration Stay Order,* 12 FCC Rcd 15,739.

[14] *Id.*

[15] Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Petitions for Forbearance, *Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347 (released Dec. 31, 1998) ("*Rate Integration Further Reconsideration and Forbearance Order*").

[16] 47 U.S.C. § 160.

III. APPLICABILITY OF RATE INTEGRATION TO CMRS SERVICES

A. Overview

8. In the following sections, we invite interested parties to comment on the application of section 254(g) to CMRS services. Specifically, we seek comment on how section 254(g) should be applied to wide-area calling plans, services offered by affiliates, plans that assess local airtime or roaming charges in addition to separate long-distance charges for interstate, interexchange services, and whether cellular and PCS service rates should be integrated.

B. Wide-Area Calling Plans

9. Many CMRS providers have created calling plans that allow customers to extend the size of the calling area in which they do not incur roaming or separate long-distance charges, generically referred to as wide-area calling plans. Under these types of plans, the customer generally is assessed a monthly fee and obtains a specified number of airtime minutes as part of the monthly charge. Under these plans, the airtime charge is identical for all calls, regardless of whether the call is a local or a toll call. An additional airtime charge is assessed for airtime beyond that included under the plan. Wide-area calling plans often include volume discounts and term commitment features. The scope of wide-area plans varies greatly -- from plans covering discrete regional areas to plans that cover the entire United States and its territories and possessions. The number and variety of wide-area plans has increased significantly in the recent past. In this section, we seek comment on: (1) whether there are wide-area calling plans or other types of plans that should not be subject to rate integration; (2) what limitations would rate integration requirements place on CMRS providers' plans; and, (3) whether we should forbear from rate integration requirements for some, or all, wide-area plans.

10. CMRS providers state that their ability to respond to consumer needs, to offer pricing options, and to give customers choice would be impaired if rate integration is applied to wide-area calling plans.[17] BellSouth argues that wide-area calling plans address local conditions and, if subjected to rate integration, CMRS carriers would be precluded from competing based on service packages that include interexchange services. BellSouth states that these wide-area plans are analogous to extended area service (EAS) plans, noting that they often cover larger areas than do wireline EAS plans because of the mobile nature of the service.[18]

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[17] *See, e.g.,* Personal Communications Industry Association (PCIA) Petition at 6-7.

[18] BellSouth Corporation ("BellSouth") Petition at 20. Under an EAS plan, a customer of a wireline telephone company can, for a higher monthly charge, make local calls to an area larger than that reflected by the exchange in which the customer is located.

11. Wide-area calling plans appear to offer customers significant benefits in the form of a simplified rate structure and additional choice. We believe that the analysis of wide-area calling plans begins with an examination of what constitutes an interexchange service, which is not defined in the Act. Some parties argue that the meaning of interexchange service should be derived from the definition of "telephone toll service."[19] Telephone toll service is defined as "telephone service between stations in different exchange areas for which a charge is not included in contracts with subscribers for exchange service."[20] Some CMRS providers assert that because CMRS providers are not rate regulated, CMRS providers can establish any area they choose as the "exchange" area. Under this approach, an interexchange call exists only if a separate charge is assessed for the interexchange call.[21] Parties note that exchange areas are defined in varying ways by incumbent LECs, for example, by different types and sizes of EAS arrangements. Alaska appears to support the view that the CMRS industry can establish the "exchange" area. According to Alaska, CMRS calls for which there is no toll charge are not considered interexchange and, for this reason, may not properly be subject to rate integration.[22]

12. Hawaii, on the other hand, argues that calls between exchanges are interexchange and must be integrated. For this purpose, Hawaii would treat any interstate call crossing an MTA as an interexchange call.[23] Hawaii states that if the coverage area of a wide-area calling plan becomes so large as to encompass most of the mainland United States, a fundamental discrimination issue would be raised if Hawaii were excluded from such a postalized rate structure.[24] Hawaii argues that rate integration should apply to CMRS calling plans with a toll service charge, direct or hidden, separate from local airtime charges.[25]

13. The definition of "telephone toll service" depends, in part, on the definition of "exchange services." "Telephone exchange service" is defined as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge, *or* . . . comparable service

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[19] *See, e.g.*, PrimeCo Personal Communications, L.P. ("PrimeCo") Petition at 11-12; Centennial Cellular Corp. ("Centennial") Reply at 2; State of Hawaii ("Hawaii") Opposition at 21-22.

[20] 47 U.S.C. § 153(48).

[21] *See, e.g.*, Centennial Reply at 5.

[22] State of Alaska ("Alaska") Opposition at 15.

[23] Letter from Herbert Marks, Esq., Counsel for the State of Hawaii, to William E. Kennard, Chairman, Federal Communications Commission, dated Nov. 24, 1998.

[24] Hawaii Opposition at 19.

[25] Hawaii Opposition at 22-23.

provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[26] In the *Local Competition Order,*[27] the Commission found that cellular, broadband PCS, and covered SMR providers fall within at least the second part of the definition because they provide "comparable service" to telephone exchange service. The services offered by cellular, broadband PCS, and covered SMR providers were found to be comparable because, as a general matter, local, two-way switched voice service is a principal part of the service. We then concluded in the *Local Competition Order* that MTAs defined the area in which reciprocal compensation applies to interconnections between incumbent LECs and CMRS providers pursuant to section 251(b)(5).[28]

14. We invite parties to comment on how the definitions of "telephone toll service" and "telephone exchange service," should be applied in the CMRS context. We also seek comment on whether a nationwide wide-area calling plan would be a telephone exchange service pursuant to section 3(47) of the Communications Act; whether the Commission should define this term for rate integration purposes; or whether, as alleged by some, the definition should be left to the discretion of CMRS providers because exchange services are not subject to rate integration. In addressing these issues, parties should discuss the competitive implications of the alternative positions.

15. We invite parties to comment on alternative ways of implementing rate integration in the wide-area calling plan context to foster customer choice, pricing flexibility, and competitive development of the industry. Specifically, what must a CMRS provider do in offering wide-area plans to comply with rate integration requirements? To assist us in this effort, we invite parties to document the types of wide-area calling plans that are available, including the range of plans that individual CMRS carriers offer. We are particularly interested in comparisons between regional plans and those that have a nationwide orientation. In addition, parties should indicate whether these wide-area plans encompass Alaska, Hawaii, and the U.S. territories and possessions. Parties are asked to discuss whether the existence of a basic plan with separate interexchange charges at integrated rates, or the availability of dial-around to reach a long-distance carrier with integrated rates, would warrant either minimal regulation of, or forbearance from regulating, wide-area calling plans pursuant to section 254(g).

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[26] 47 U.S.C. § 153(47) (emphasis added).

[27] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15998-16000 (1996) (*"Local Competition Order"*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[28] 47 U.S.C. § 251(b)(5); *Local Competition Order*, 11 FCC Rcd at 16014.

16. We also seek comment on how to evaluate multiple wide-area calling plans offered by a CMRS provider. Are there criteria that could be applied that would permit a variety of such plans to exist, while still complying with the rate integration requirement? If a CMRS provider offers wide-area calling plans, we invite parties to address whether it should be required to offer at least one such plan that serves all locations. Parties should comment on whether an approach that prohibited special rate categories for calls to non-contiguous insular points on a market-by-market basis, as suggested by PrimeCo, would be sufficient to prevent discrimination.[29] Parties should focus on how any proposed approach to the treatment of wide-area calling plans balances the objective of fostering competitive market conditions with the goals of rate integration. Finally, we ask that parties discuss the implications of each approach for other policies applicable to CMRS providers.

17. Alternatively, we seek comment on whether forbearance from the application of rate integration to wide-area calling plans is appropriate. Parties are invited to comment on whether the conditions in the CMRS market are such that the requirements of section 10 would be satisfied. Finally, we seek comment on the extent to which the continued applicability of sections 201(b) and 202(a) of the Act is sufficient to protect against discriminatory or unreasonable rates; and, on the impact of specific proposals on small business entities, including new entrants.[30]

C. Affiliation Requirements

18. The Commission's rate integration policy has always required rate integration across affiliates. For instance, in the past, the Commission has treated all of AT&T's regional interexchange affiliates as a single entity for purposes of rate integration.[31] Without that treatment, AT&T could have used a different rate structure for each of its regional affiliates, thereby frustrating rate integration between mainland U.S. points and Alaska, Hawaii, and the U.S. Virgin Islands. We tentatively conclude that an interpretation of section 254(g), consistent with this prior policy, that requires rate integration across affiliates is also consistent with the Congressional intent of section 254(g). We believe that a more complete

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[29] PrimeCo Petition at 14.

[30] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[31] *See, e.g.*, Application of Alascom, Inc., AT&T Corp. and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corp., 11 FCC Rcd 732, 743, 747 (AT&T/Alascom, as a separate subsidiary of AT&T, files interstate tariffs with rates that mirror the rates in AT&T's tariffs covering the contiguous 48 states). In Integration of Rates and Services, 61 FCC 2d 380, the Commission required GTE's affiliate Hawaiian Telephone Company ("HTC") to integrate the rates for Hawaii-mainland interexchange service into the rate structure established by AT&T in the mainland, even though: (1) HTC provided no service between mainland points; and, (2) HTC was not affiliated with AT&T. In the same order, the Commission conditionally required HTC to file a tariff for Hawaii-mainland WATS service that was patterned after the rate structure contained in AT&T's mainland WATS tariff. 61 FCC 2d at 394.

record will benefit us in determining the degree of affiliation that should trigger rate integration obligations for CMRS providers.

19. In the *Rate Integration Reconsideration Order*, we specified that the current definitions of "affiliate" and "control" in section 32.9000 of the Commission's rules will be used to determine whether companies are sufficiently related to require them to integrate their rates.[32] Thus, we required affiliates under common ownership and control to integrate their rates. We observed that these definitions will permit application of rate integration to closely related affiliates while excluding those not under common control.[33]

20. CMRS providers assert that the affiliation rule is unworkable and could produce anticompetitive results.[34] They state that CMRS ownership arrangements are complicated, typically including partnership arrangements among carriers that are often competitors in other markets.[35] For example, PrimeCo states that it is owned on a 50/50 basis by PCS Nucleus, L.P. and PCSCO Partnership, neither of which is a telecommunications carrier. PrimeCo further states that PCS Nucleus is owned equally by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc, which, in turn, are owned by AirTouch and U S WEST, respectively. Moreover, according to PrimeCo, PCSCO Partnership is owned by Bell Atlantic Personal Communications, Inc., which is owned by Bell Atlantic. AirTouch, U S WEST, and Bell Atlantic Mobile own or control other cellular and PCS systems.[36] Several CMRS providers assert that the current affiliation requirement would force all related carriers to adopt identical rates and rate structures, thereby preventing CMRS providers from responding to competition and depriving customers of the benefits of pricing flexibility and customer choice associated with the detariffed CMRS environment.[37] Alaska and Hawaii agree that

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[32] This rule defines "affiliated companies" as "companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the accounting company." 47 C.F.R. § 32.9000. "Control" is defined as "the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means." *Id.*

[33] *Rate Integration Reconsideration Order*, 11 FCC Rcd 11820-21.

[34] *See, e.g.,* Comcast Cellular Communications, Inc. Reply at 3.

[35] *See, e.g.,* AirTouch Communications (AirTouch) Petition at 14-15; PrimeCo Petition at 15.

[36] PrimeCo Petition at 15.

[37] *Id.* at 16-17.

some modification of the affiliation rule as applied to CMRS providers may be required in light of complex ownership arrangements.[38]

21. Parties to the proceeding present vastly divergent proposals on the appropriate affiliation requirement to apply to CMRS providers under section 254(g). Several CMRS providers argue that the Commission should totally forbear from applying any affiliation rules to CMRS providers.[39] AirTouch asserts that only entities that are identically owned by a single carrier should be considered affiliated and be required to integrate their interstate, interexchange rates.[40]

22. Alaska and Hawaii, on the other hand, express concern that without an affiliation rule, CMRS providers would be able to avoid the congressional mandate of integrated interexchange rates by using or creating multiple interexchange carrier subsidiaries, each serving a separate geographic area.[41] Hawaii asserts that section 254(g) requires rate integration across CMRS affiliates except in limited circumstances. Hawaii states that affiliation should not apply to multiple competing parent companies that jointly control a CMRS provider, and commonly owned CMRS providers to the extent they compete in the same geographic service area.[42] Alaska states that all CMRS operations that are commonly controlled by the same single entity should be required to integrate their interstate, interexchange service rates.[43]

23. A workable affiliation rule is essential to preclude CMRS providers from evading the rate integration requirement of section 254(g) by the simple process of creating separate, affiliated companies to serve different geographic areas. We recognize, however, that too stringent an affiliation rule could be unworkable and adversely effect pricing and customer choice, because of the complex nature of the CMRS market. We invite parties to propose the appropriate affiliation requirement. We request parties to address the following affiliation standards: (1) fifty-one percent or greater ownership control; and (2) eighty percent ownership control resulting in accounting on a consolidated basis. Parties should discuss how positive or negative control should affect the analysis. Parties also are asked to identify CMRS providers serving Alaska, Hawaii, and the U.S. territories and possessions that would

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[38] Alaska Opposition at 14; Hawaii Opposition at 23.

[39] *See, e.g.*, PrimeCo Petition at 17.

[40] AirTouch Petition at 14.

[41] Hawaii Opposition at 25; Alaska Opposition at 9.

[42] Hawaii Opposition at 23.

[43] Alaska Opposition at 15.

be affected by different affiliation standards. We invite parties to suggest other affiliation standards that they believe are more workable. Finally, we seek comment on the nature of the fiduciary duty owed by a controlling partner to its partners, how that duty would be affected by application of the statutory requirements of section 254(g), and how that duty should affect the level of affiliation required to trigger rate integration requirements in the CMRS industry.

24. We also seek comment on whether conditions in the CMRS market warrant forbearance from application of the affiliation requirement under section 10 of the Act. Parties should address how each element of the forbearance standard is met. Finally, parties should address the extent to which any affiliate standard they propose affects small business entities, including new entrants.[44]

D. Plans that Assess a Local Airtime or Roaming Charge Plus Separate Long-Distance Charges for Interstate, Interexchange Services

25. Within a customer's home area, the customer, in addition to making local calls, can make calls outside of the local calling area. The CMRS provider may assess a local airtime charge and a separate long-distance charge. Airtime charges may vary from one service area to another.[45] When the call is an interstate, interexchange call, the call is subject to the rate integration requirement of section 254(g).

26. Under roaming arrangements, a CMRS customer is able to: (1) originate calls outside the local calling area to which the customer is subscribed; and (2) receive calls when outside the subscribed-to calling area.[46] In the case of an originating interexchange call, a separate toll charge is generally assessed for the interexchange portion of the roaming call, in addition to the roaming airtime charge. In the case of a terminating call from outside the local calling area of the roamed upon carrier, the roaming customer may pay a toll charge for the interexchange transmission from the home CMRS providers' switch to the roamed upon carrier's switch, in addition to the roaming airtime charge.[47]

27. Several CMRS providers assert that applying rate integration to airtime and roaming charges when associated with an interstate, interexchange call would force CMRS providers to charge the same local airtime charge in all their service areas and the same

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[44] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[45] *See* Cellular Telecommunications Industry Association (CTIA) Petition at 4.

[46] There may be a limited number of situations in which roaming charges will apply even when the customer is in its carrier's local calling area.

[47] The calling party will pay any toll charges associated with reaching the CMRS provider's switch in the customer's home area.

roaming airtime charge in all roaming areas.[48] BellSouth argues that imposing rate integration on roaming services would preclude CMRS providers from competing on the basis of roaming footprints.[49] Several CMRS providers allege that rate integration would adversely affect the competitiveness of CMRS services, eliminate pricing flexibility, and reduce customer choices.

28. In this section, we seek further comment on the effects of the rate integration requirement of section 254(g) on the airtime or roaming charges associated with interstate, interexchange calls for which a separate long-distance charge is assessed. Airtime and roaming charges may be viewed in one or more ways. For example, airtime and roaming charges could be viewed as not interexchange in character and, therefore, not subject to rate integration, if the charges do not vary with the local or toll nature of the call. Alternatively, airtime and roaming charges could be viewed as part of the price for the long-distance call and, therefore, subject to the rate integration requirement. We request comment on the legal and policy implications of the alternatives described above. Parties also should discuss any interrelationships with the definition of "exchange" and "interexchange," discussed above in conjunction with the consideration of wide-area calling plans.

29. The local airtime or roaming charge assessed for a purely local call generally is the same as that assessed in connection with a toll call. That charge may vary from calling area to calling area because of differences in market conditions, just as exchange rates of incumbent LECs may vary among exchanges. We note that much of the traffic subject to airtime or roaming charges originates and terminates within the local calling area of the home provider or the roamed upon provider. As we concluded in the *Rate Integration Further Reconsideration and Forbearance Order*,[50] that traffic, which involves no interstate, interexchange component, is not subject to rate integration. If airtime and roaming charges are subjected to rate integration, CMRS providers claim that they would be forced to assess the same airtime and roaming charge in all locations. Several parties noted that such a requirement could affect CMRS providers' ability to respond to competition or to offer customers a variety of pricing options. We seek comment on the ability of CMRS providers to impose separate, uniform airtime and roaming charges when a call is an interstate, interexchange call. To assist us in evaluating the implications of the application of rate integration to airtime and roaming charges, parties should provide detailed information on the percentage of calls and minutes that are local in nature as opposed to the percentage of calls and minutes that are toll.

30. CMRS providers state that airtime and roaming charges primarily reflect local market conditions. They allege that costs do not vary as widely as costs vary for exchange

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[48] *See, e.g.,* BellSouth Petition at 16.

[49] *Id.*

[50] *Rate Integration Further Reconsideration and Forbearance Order* at 11-12.

carriers, and that CMRS rates do not include subsidies that support high exchange costs.[51] We ask parties to address the extent of any cost difference between the contiguous states and Hawaii, Alaska, and the covered U.S. territories and possessions, and to submit demonstrative evidence supporting their cost difference data. Parties also should address the extent to which any options they propose would affect small business entities, including new entrants.[52]

31. Finally, we ask parties to comment on whether, if we determine that airtime and roaming charges are properly part of an interstate, interexchange call, we should forbear from applying the rate integration requirement of section 254(g) to those airtime and roaming charges. Parties urging forbearance should discuss the standards of section 10 of the Act and how each element of the forbearance analysis is met. Parties also should discuss the effect of the continued applicability of sections 201, 202, and 208 on the forbearance analysis. In particular, we ask parties to discuss the extent to which those sections will protect consumers in a less than fully competitive market.

E. Integration of Cellular and PCS Services

32. Wireline interexchange carriers have been required to integrate rates for classes of services. Thus, for example, AT&T MTS, WATS, and private line services have never been required to be integrated with each other. Moreover, within the MTS class of service, for example, the various optional calling plans have not been required to be rate integrated with each other; similarly, 800 and out-WATS service have never been rate integrated. BellSouth requests that rate integration not apply across cellular-PCS services within a company or group of affiliates, to the extent CMRS remains subject to rate integration at all.[53] According to BellSouth, such a requirement would restrain the development of PCS service, which must differentiate itself from cellular services that already exist.[54] Hawaii asserts that cellular and PCS services are substitutable with one another and can often be handled by the same handset.[55]

33. We invite parties to comment on whether the rates of cellular and broadband PCS services should be integrated. Parties should discuss any similarities or differences in the operation of cellular and PCS networks, as well as customer perceptions of the two types of services. Parties also are asked to suggest other similarities or differences that should affect

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[51] *See, e.g.,* AirTouch Reply at 10.

[52] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[53] BellSouth Petition at 24.

[54] *Id.*

[55] Hawaii Opposition at 6, n.14.

our decision as to whether cellular and PCS services should be rate integrated. We invite parties to discuss the effect that requiring these services to integrate their rates would have on the intent, in part, that PCS service provide competition to cellular service. In addition, we ask parties to comment on whether their position differs if the CMRS provider uses an integrated cellular and PCS network to provide a single CMRS service or if the CMRS provider offers separate cellular and PCS services using distinct cellular and PCS facilities. Finally, we invite parties to address the extent to which a requirement to integrate the rates of cellular and PCS services would affect small business entities, including new entrants.[56]

IV. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

34. The Further Notice contained herein is a permit-but-disclose proceeding and is subject to the permit-but-disclose requirements under section 1.1206(b) of the rules, 47 C.F.R. § 1206(b), as revised. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[57] Other rules pertaining to oral and written presentations are set forth in section 1.1206(b), as well.

B. Paperwork Reduction Act

35. The Further Notice contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and does not contain new or modified information collections subject to Office of Management and Budget review.

C. Initial Regulatory Flexibility Act Analysis

36. As required by the Regulatory Flexibility Act (RFA),[58] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this Further Notice of Proposed Rulemaking. The analysis is set forth in the Appendix. Written public comments are requested on the IRFA. Comments and reply comments must be identified by a separate and distinct heading as responses to the IRFA and must be filed on or before May 27, 1999

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[56] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[57] *See* 47 C.F.R. § 1.1206(b)(2), as revised.

[58] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

and June 28, 1999, respectively. Parties should address the extent to which our proposals affect large and small CMRS providers differently and how small business entities, including new entrants, will be affected. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Further Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.[59] In addition, the Further Notice of Proposed Rulemaking and IRFA (or summaries thereof) will be published in the Federal Register.[60]

D. Comment and Reply Comment Filing Dates and Procedures

37. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before May 27, 1999, and reply comments on or before June 28, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[61]

38. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Only one copy of the electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, including "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

39. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth St., S.W., Room TW-A325, Washington, DC 20554.

40. Parties that choose to file by paper should also submit their comments on diskette. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the docket number in this case, CC Docket No. 96-61); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also

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[59] *See* 5 U.S.C. § 603(a).

[60] *See id.*

[61] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

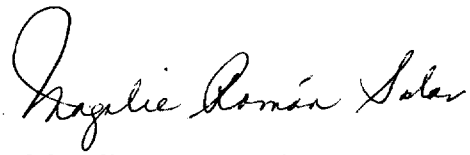
include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036.

IV. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 201-202, 254, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-202, 254, 303(r) and 403, that NOTICE IS HEREBY GIVEN of the rulemaking described above and that COMMENT IS SOUGHT on these issues.

42. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX

Initial Regulatory Flexibility Act Analysis

1. As required by the RFA,[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Further Notice.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided above in paragraph 35. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules.

2. In the 1996 Act, Congress directed the Commission to develop rules implementing the provisions of section 254(g) within six months of its enactment. The Commission adopted broad rules implementing the provisions of section 254(g) in the *Rate Integration Order.* In the Further Notice, We seek comment on how the rate integration requirement of section 254(g) should be applied to certain interstate, interexchange offerings of CMRS providers. The objective is to develop rate integration policies for CMRS providers that address the conditions in the CMRS marketplace, while fulfilling the rate integration objective of section 254(g).

B. Legal Basis.

3. The proposed action is authorized by Sections 1-4, 201-202, 254, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-202, 254, 303(r) and 403.

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[1] *See* 5 U.S.C. § 603.

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). [7]

(a) Cellular Radio Telephone Service

5. The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[8] According to the 1992 Census, which is the most recent information available, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[9] Therefore, even if all 12 of these large firms were cellular telephone companies, all of the remainder were small businesses under the SBA's definition. Although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses. We assume that, for purposes of our evaluations in this IRFA, all of the current cellular licensees are small entities, as that term is defined by the SBA.

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4 5 U.S.C. § 603(b)(3).

5 *Id.* § 601(6).

6 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

7 Small Business Act, 15 U.S.C. § 632 (1996).

8 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

9 U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

(b) Broadband Personal Communications Service

6. The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to Section 24.720(b) of the Commission's Rules,[10] the Commission has defined "small entity" for Block C and Block F licensees as firms that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.[11]

7. The Commission has auctioned broadband PCS licenses in all of its spectrum blocks A through F. We do not have sufficient data to determine how many small businesses under the Commission's definition bid successfully for licenses in Blocks A and B. As of now, there are 90 non-defaulting winning bidders that qualify as small entities in the Block C auction and 93 non-defaulting winning bidders that qualify as small entities in the D, E, and F Block auctions. Based on this information, we conclude that the number of broadband PCS licensees that would be affected by the proposals in this Notice includes the 183 non-defaulting winning bidders that qualify as small entities in the C, D, E, and F Block broadband PCS auctions.

(c) Specialized Mobile Radio

8. Pursuant to Section 90.814(b)(1) of the Commission's Rules,[12] the Commission has defined "small entity" for geographic area 800 MHz and 900 MHz SMR licenses as firms that had average gross revenues of no more than $15 million in the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[13]

9. The proposals set forth in the Further Notice may apply to SMR providers in the 800 MHz and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz

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[10] 47 C.F.R. § 24.720(b).

[11] *See* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84 (1994).

[12] 47 C.F.R. § 90.814(b)(1).

[13] *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act — Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act — Competitive Bidding, PP Docket No. 93-253, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

geographic area SMR service, nor how many of these providers have annual revenues of no more than $15 million.

10. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities under the Commission's definition in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the proposals set forth in this Notice includes these 60 small entities.

11. A total of 525 licenses were auctioned for the upper 200 channels in the 800 MHz geographic area SMR auction. There were 62 qualifying bidders, of which 52 were small businesses. The Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA's definition will win these lower channel licenses. We assume that, for purposes of our evaluations in this IRFA, all of the current specialized mobile radio licensees are small entities, as that term is defined by the SBA.

(d) 220 MHz Service

12. The Commission has classified providers of 220 MHz service into Phase I and Phase II licensees. There are approximately 2,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission recently conducted the Phase II auction. There were 54 qualified bidders, of which 47 were small businesses.

13. At this time, however, there is no basis upon which to estimate definitively the number of phase I 220 MHz service licensees that are small businesses. To estimate the number of such entities that are small businesses, we apply the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[14] According to the 1992 Census, which is the most recent information available, only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees — and these may or may not be small entities, depending on whether they employed no more than 1,500 employees.[15] But 1,166 radiotelephone firms had fewer than 1,000 employees and therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in the phase I 220 MHz service.

[14] 13 C.F.R. § 121.201, SIC Code 4812.

[15] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995).

(e) Mobile Satellite Services (MSS)

14. The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts.[16] According to the Census Bureau, there were a total of 848 communications services, NEC in operation in 1992, and a total of 775 had annual receipts of less than $9.999 million.[17]

15. Mobile Satellite Services or Mobile Satellite Earth Stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub or stations. The stations that are capable of transmitting while a platform is moving are included under Section 20.7(c) of the Commission's Rules[18] as mobile services within the meaning of Sections 3(27) and 332 of the Communications Act.[19] Those MSS services are treated as CMRS if they connect to the Public Switched Network (PSN) and also satisfy other criteria of Section 332. Facilities provided through a transportable platform that cannot move when the communications service is offered are excluded from Section 20.7(c).[20]

16. The MSS networks may provide a variety of land, maritime and aeronautical voice and data services. There are eight mobile satellite licensees. At this time, we are unable to make a precise estimate of the number of small businesses that are mobile satellite earth station licensees.

(f) Paging Services

17. The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the paging service. A small business is defined as either (1) a entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. The SBA has approved this definition for paging companies.

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[16] 13 C.F.R. § 120.121, SIC Code 4899.

[17] 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4899 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[18] 47 C.F.R. § 20.7(c).

[19] 47 U.S.C. §§ 153(27), 332.

[20] 47 C.F.R. § 20.7(c).

18. The Commission estimates that the total current number of paging carriers is approximately 600. In addition, the Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be granted or auctioned. The geographic area licenses will consist of 2,550 Major Trading Area (MTA) licenses and 14,080 Economic Area (EA) licenses. In addition to the 47 Rand McNally MTAs, the Commission is licensing Alaska as a separate MTA and adding three MTAs for the U.S. territories, for a total of 51 MTAs. No auctions of paging licenses have been held yet, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that no reliable estimate of the number of paging licensees can be made, we assume, for purposes of this IRFA, that all of the current licensees and the 16,630 geographic area paging licensees either are or will consist of small entities, as that term is defined by the SBA.

(g) Narrowband PCS

19. The Commission has auctioned nationwide and regional licenses for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition. At present, there have been no auctions held for the MTA and Basic Trading Area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licensees and 2,958 BTA licensees will be awarded in the auctions. Those auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have fewer than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, that all of the licensees will be awarded to small entities, as that term is defined by the SBA.[21]

(h) Air-Ground Radiotelephone Service

20. The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's rules.[22] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[23] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

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[21] *See id.*

[22] 47 C.F.R. § 22.99.

[23] 13 C.F.R. § 121.201, SIC 4812.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

21. We project that any rules adopted in response to the Further Notice will impose no significant new reporting or recordkeeping requirements on CMRS providers. CMRS providers will, of course, have to comply with any rate integration requirements that may be adopted in a final order. As part of that requirement, they may have to integrate their rates with those of specified affiliates.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

22. Throughout this Further Notice, we seek comment on the impact of the proposals in the Further Notice on small entities. We also seek comment on whether we should forbear from applying any of the rate integration requirements on which comment is sought to CMRS providers.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.

23. None.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance (CC Docket No. 96-61), *Further Notice of Proposed Rulemaking*

In addressing petitions for reconsideration and forbearance earlier in this proceeding, I applauded the Commission's regulatory restraint by limiting enforcement of 254(g)'s rate integration provision, in certain respects, as it applies to Commercial Mobile Radio Service (CMRS) providers. I also support this Further Notice and commend the Commission's willingness to build a better record and explore the extent to which rate integration under section 254(g) applies – or not – to the interstate, interexchange services offered by wireless carriers. This Notice, however, focuses on wide-area calling plans offered by CMRS providers, the degree of affiliation that should apply to services offered by CMRS providers, the applicability of rate integration to airtime and roaming charges associated with interstate, interexchange calls, and other narrow issues.

I believe that this Notice misses an opportunity to explore in earnest the broader issues surrounding the applicability and impact of Section 254(g) on CMRS carriers *and* consumers. In this regard, I would have preferred to allow – for the first time in this proceeding – the development of a record on whether we should generally forbear from applying this provision or our rules to this class of telecommunication carriers or services in any or some of their geographic markets. *See* 47 U.S.C. § 160(a). In this Notice, we should have at least given interested parties another chance to supplement the record in this proceeding. We should have sought comment on the competitive circumstances surrounding the provision of interstate, interexchange services offered by both wireless and wireline carriers across the United States and in particular geographic areas or regions, including especially the country's remote and non-contiguous insular regions.

We should have asked commenters to identify the applicable product and geographic markets and provide data or information regarding the competitors in the market or markets, the competitive characteristics of the markets, and the actual or likely competitive or consumer harms that would result from the continued enforcement of our rule implementing section 254(g)'s rate integration provision. On this latter point, parties should have been invited to address whether application of this provision tends more to promote or impede (1) expansion of wireless service to high cost areas, (2) carriers' ability to respond to price pressures in competitive markets, (3) the ability of CMRS to become a substitute to traditional local wireline service, and (4) technological and marketing innovations. We also could have

asked whether there are more narrowly tailored ways to achieve the objectives of the rate integration policy.

In my mind, we failed the last time we had the opportunity to address rate integration forbearance. Here is yet another opportunity lost. In any event, I personally invite parties (on all sides) to comment on the issues I have addressed above.